SUPREME COURT, U.S.
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No. ——

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

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JOSEPH J. PICKREL and
JAMES ROBERT PICKREL,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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31

## QUESTIONS PRESENTED

1. Where petitioners received excessive sentences based upon the higher Sentencing Guidelines for "D" methamphetamine rather than the much-lower Guidelines for "L" methamphetamine, were such petitioners denied their Sixth Amendment right to effective assistance of counsel, where (1) their counsel never mentioned to the sentencing court the considerable difference in the length of sentence imposed for "D" as opposed to "L" methamphetamine, much less put the government to its proof, if any it had, that the drugs involved were in fact "D" methamphetamine and, (2) the trial court sentenced the petitioners under the much higher guidelines for "D" methamphetamine without any mention of the "D"/"L" distinction, much less any evidence being offered to show that the drugs were in fact the more heavily punished "D" methamphetamine?

2. Where the government has destroyed the drugs involved prior to the time of the filing of a petition for relief under 28 U.S.C. § 2255, and thus the methamphetamine cannot be tested to determine whether it is "D" or "L" methamphetamine, or some combination thereof, is it Constitutionally appropriate for the Ninth Circuit to impose upon defendants the burden of showing that the drugs were in fact "L" and not "D" methamphetamine, in order to meet the *Strickland* requirement that there must be prejudice flowing from counsel's failure to put the government to its proof, if any it had, that the drugs involved were in fact the much-heavier sentenced "D" methamphetamine?

3. Should petitioners have been allowed the evidentiary hearing they requested of the district court in this habeas proceeding for the purpose of attempting to determine whether the drugs involved in their criminal case had in fact been the more severely punished "D" methamphetamine, as had been assumed without proof when they were sentenced in the underlying criminal case?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT | 2 |
| REASONS FOR GRANTING THE PETITION | 4 |
| I. THE NINTH CIRCUIT REASONING IS FLAWED; THE TENTH CIRCUIT REASONING CORRECTLY CAPTURES THE REQUIREMENTS OF *STRICKLAND v. WASHINGTON* | 6 |
| II. GLOVER IS SOUND WHEREAS McMULLEN IS UNFAIR AND INVITES FUTURE MISTAKES | 10 |
| CONCLUSION | 11 |

## TABLE OF AUTHORITIES


CASES — Page

*McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L.Ed.2d 67 (1986) ..... 7

*Reece v. United States*, 119 F.3d 1462 (11th Cir. 1997) ..... 7

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ..... *passim*

*Tippens v. Walker*, 77 F.3d 682, (2nd Cir. 1996) .... 10

*United States v. Apfel*, 97 F.3d 1074 (8th Cir. 1996) ..... 7

*United States v. Castro*, 972 F.2d 1107 (9th Cir. 1992) ..... 2

*United States v. Dudden*, 65 F.3d 1461 (9th Cir. 1995) ..... 7

*United States v. Glover*, 97 F.3d 1345 (10th Cir. 1996) ..... 5, 8-10

*United States v. Kussmaul*, 987 F.2d 345 (6th Cir. 1993) ..... 2

*United States v. McMullen*, 98 F.3d 1155 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2444 (1997) ..... *passim*

*United States v. Patrick*, 983 F.2d 206 (11th Cir. 1993) ..... 7

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI ..... 2

STATUTES

21 U.S.C. § 821 ..... 3

21 U.S.C. § 826 ..... 3

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. § 2101(c) ..... 2

28 U.S.C. § 2255 ..... 4

United States Sentencing Guidelines § 2D1.1; Amendment 518 ..... 2

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JOSEPH J. PICKREL and
JAMES ROBERT PICKREL,
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UNITED STATES OF AMERICA,
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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

---

Joseph Jay Pickrel and James Robert Pickrel (hereinafter "petitioners") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, rendered in their consolidated appeal, which judgment affirmed the denial by the district court of their 28 U.S.C. § 2255 motions to either vacate sentences imposed by the United States District Court for the District of Oregon or, alternatively, to allow an evidentiary hearing to attempt to determine what drug had been involved in their criminal case and thus what was the correct sentence to have imposed.

## OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-4a) and the district court (Pet. App. 5a-10a; 11a-12a) are not reported.

## JURISDICTION

The judgment of the court of appeals was entered on November 19, 1997. [App. 1a.] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely filed pursuant to 28 U.S.C. § 2101(c).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall . . . have Assistance of Counsel for his defence."

The United States Sentencing Guidelines effective in October, 1987,[1] provided separate Guideline ranges for two types of methamphetamine. The Drug Quantity Table [Appendix 13a-14a] in that edition of the Guidelines does not specifically mention methamphetamine, but the related Drug Equivalency Tables [Appendix 14a] reveal that "D"-methamphetamine, which is most active on the central nervous system, was treated much more severely than L-methamphetamine, a substance which acts on the peripheral nervous system. In that Drug Equivalency Table, one gram of methamphetamine was assigned an equivalency of 2.0 grams of cocaine, while one gram of L-methamphetamine was assigned the significantly lower drug equivalency of 0.2 grams of cocaine, one-tenth the amount, with commensurate reductions in applicable offense levels.[2]

## STATEMENT

The court of appeals in this case held that petitioners' rights to effective assistance of counsel were not denied

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[1] Applicable guidelines are those in effect as of the date of the offense. *United States v. Kussmaul*, 987 F.2d 345 (6th Cir. 1993). *See also, United States v. Castro*, 972 F.2d 1107 (9th Cir. 1992).

[2] As of November 1, 1995, the distinction between methamphetamine types has been eliminated for the purpose of determining sentencing. Sentencing Guidelines Amendment 518.

when, after entering pleas of guilty, they received much-larger sentences under the guideline for "D" methamphetamine rather than the lower guideline applicable to "L" methamphetamine, even though (1) the indictment to which they pleaded guilty did not allege the more-heavily punished "D" methamphetamine (it was silent as to the type), (2) defense counsel did not ever test the drugs involved despite having been given the opportunity to do so, (3) counsel did not mention the vast sentencing difference at the sentencing hearing, much less request that the government prove that the substance was in fact "D" methamphetamine, (4) the government offered no proof at sentencing that the drugs involved were in fact "D" as opposed to "L" methamphetamine, (5) by the time that petitioners filed their ineffective assistance of counsel claims (after their direct appeal, in which the "D" vs. "L" issue was not raised, and thus lost) the government had destroyed the drugs involved, and (6) the district court hearing this claim and refused to hold a hearing to make a determination of whether the drugs involved were in fact "D" or "L" methamphetamine. Petitioner seeks review of this refusal.

The facts underlying the Sixth Amendment claim are set forth in the opinions below. Petitioners, who are brothers, were indicted for conspiracy to manufacture and distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. [App. 2a.] The indictment was silent as to the type of methamphetamine. [App. 2a.] Petitioners pleaded guilty on October 29, 1990 [App. 5a]; once again, there was no reference to the type of methamphetamine. Petitioner Joe Pickrel received a sentence of 240 months, the sentence applicable for "D" methamphetamine, rather than the applicable sentence for "the less severely punished l-methamphetamine." [App. 3a.] Petitioner James Pickrel received a sentence of 160 months, the sentence applicable for "D" methamphetamine, rather than the applicable sentence for "the less severely punished l-methamphetamine." [App. 3a.]

Counsel for both petitioners failed to object at sentencing to the government's characterization of the methamphetamine as type "D." [App. 7a.] The same counsel also "did not preserve this issue for appeal." [App. 7a.] The drugs were destroyed after the sentence was imposed, leading the District Court in the later-filed habeas proceeding brought under 28 U.S.C. § 2255, to conclude, "[A]bsent evidence to back up his claim, he has failed to show prejudice and is not entitled to relief." [App. 9a.] The district court thus denied the ineffective assistance of counsel claim and refused to hold a hearing.

On appeal of the district court's denial of the section 2255 claims, the Court of Appeals noted that the original sentencing court rendered its sentences not on proof, but rather on the "*assumption* that the Pickrel's offense involved d-methamphetamine rather than the less severely punished l-methamphetamine." (Emphasis supplied) [App. 3a.] After observing also that "nothing in the record suggests that l-methamphetamine was actually involved," [App. 3a] the court affirmed the lower court's denial of the ineffective assistance of counsel claim by citing the Ninth Circuit law to the effect that a "failure to raise Sentencing Guidelines distinction between D-methamphetamine rather than l-methamphetamine [is] not ineffective assistance. . . ." [App. 3a.]

## REASONS FOR GRANTING THE PETITION

There is a conflict among the Circuits on the exact point involved in this case. The Ninth Circuit has a long line of cases (mostly unreported and many brought *in propria persona*) holding that the failure of defense counsel to point out at sentencing the substantial sentencing differ ence between the two types of methamphetamine is not ineffective assistance of counsel[3] *even if* everyone in-

[3] The longstanding test for ineffective assistance of counsel is stated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80

volved (defense counsel, the prosecutor and the sentencing judge) was asleep at the switch while reading the Presentence Report, at the sentencing itself, and during the direct appeal; *and* even where the drugs involved cannot later be found for testing. *See, e.g., United States v. McMullen*, 98 F.3d 1155 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2444 (1997). Conversely, the Tenth Circuit has ruled that the same circumstances do result in ineffective assistance of counsel. *United States v. Glover*, 97 F.3d 1345 (10th Cir. 1996). As shown below, the Tenth Circuit law on this point is correct and much more consistent with our Constitutionally mandated requirement of effective counsel.

The Sentencing Guidelines are the engine which runs the ever-expanding train which is this nation's criminal justice system. The Guidelines are the sentencing map which imposes very long sentences in a mechanistic way. The cost is longer dockets (because there are fewer pleas) and a greater need for prison space. The stated benefit is *uniformity* in sentencing. The goal of such uniformity requires this court to resolve this conflict between the circuits.

The Sentencing Guidelines Manual is easy to read. There is absolutely no reason for the federal courts of this country to tolerate the lapse which occurred in this case. This is important, not peripheral. As the sentencing court in this very case expressed the impact of these Guidelines:

> It's a fairly—you know—it's a very difficult thing for the court to impose this amount of time on anybody. The fact of the matter is, you'll be doing more time than the average person who commits murder

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L.Ed.2d 674 (1984). *Strickland* requires a showing that trial counsel's representation fell below an objective standard of reasonableness and that the defendant suffered prejudice, in that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different.

> in this state, which is incredible. [Court of Appeals App. No. 6.] [App. 15a.]

The prosecutor in this case called the sentence "horrific." [App. 15a.] One can only imagine how petitioner and his family must have been characterizing this long sentence as they heard it pronounced, yet through it all, defense counsel did not even think to look at the Guidelines manual which would have easily shown him a way to attempt to lessen this "horrific" result. If this country chooses to impose such long sentences by use of a grid, counsel should be charged with reading that grid, which requires no more skill than reading a map.

This issue is likely to recur. There are many similar contexts where sentences are greatly enhanced by the existence or non-existence of readily determinable facts. Some examples are the presence of crack or base cocaine versus regular cocaine; working versus non-working firearm; use of firearm versus non-use of firearm; vulnerable versus non-vulnerable victim. The existence or non-existence of such facts, and many more like them, create vast swings in the sentences imposed. This Court can, by granting this petition, assure that counsel, or the court, or the prosecutor read the simple grids relevant to the case at hand. We do not tolerate counsel sleeping during trial. Yet he or she may as well be asleep if they will not read the easy grid on a point where the sentence difference is, as the district court stated in this very case, "severe." [App. 5a.] No one is harmed by a decision which assures that the centrally important guideline provisions will be read by someone.

## I. THE NINTH CIRCUIT REASONING IS FLAWED; THE TENTH CIRCUIT REASONING CORRECTLY CAPTURES THE REQUIREMENTS OF *STRICKLAND v. WASHINGTON*

### *The Ninth Circuit*

Like every other circuit that has ruled on the matter, the Ninth Circuit has held that, if challenged at sentencing

and followed through on *direct appeal,* a sentence must be vacated if it was imposed on the assumption that the substance at issue was "D" rather than "L" methamphetamine. There must be proof by the government that the substance was in fact the more severely punishable "D" methamphetamine. *See, e.g., United States v. Dudden,* 65 F.3d 1461, 1472 (9th Cir. 1995) (". . . it was not the defense's burden to show that the drug was L-methamphetamine. It was the government's burden to produce evidence that the more potent D-methamphetamine was involved.") This is the rule in all circuits where the issue has arisen. *See, e.g., United States v. Patrick,* 983 F.2d 206 (11th Cir. 1993). These cases simply follow the general rule that when a court imposes a sentence based upon certain facts, the government generally has the burden of proving those facts. *See, McMillan v. Pennsylvania,* 477 U.S. 79, 91-92, 106 S. Ct. 2411, 2418-19, 91 L.Ed. 2d 67 (1986).

Yet the Ninth Circuit[4] turns the tables dramatically in the context of *habeas* relief. When the considerable sentencing difference between "D" and "L" methamphetamine is not mentioned at sentencing by the defense attorney or anyone else, *and* the sentencing court maks an *"assumption"* [App. 3a] that the more severely punished "D" methamphetamine is involved, the Ninth Circuit does not consider this to be substandard conduct, much less prejudicial. *McMullen, supra,* 98 F.3d, at 1158.

To explain why the failure of counsel at sentencing to note the substantial sentencing difference and to demand the required proof of "D" isomers rather than "L" isomers is not "substandard" performance within the meaning of the first prong of the *Strickland* test, the Ninth Circuit panel in *McMullen* reasoned, and has since adhered to

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[4] Several other circuits are in accord with *McMullen,* but their reasoning is the same and thus similarly flawed. *See, e.g., Reece v. United States,* 119 F.3d 1462 (11th Cir. 1997); *United States v. Apfel,* 97 F.3d 1074 (8th Cir. 1996).

such reasoning in a long line of cases, that such a failure does not fall "below prevailing professional standards." *McMullen, supra*, 98 F.2d at 1158.[5]

As to why such failure does not prejudice the defendant (the second prong of the *Strickland* test), the Ninth Circuit simply states that unless the defendant comes in to court with something other than his assertion that the drugs were the lesser-punished "L" methamphetamine, he has not shown prejudice and thus is not entitled to relief, even if that relief takes the simple form of holding a hearing to determine whether the government can meet its burden of proving that the drugs are "D" rather than "L" methamphetamine. *McMullen* advances no reason why such a simple and illuminating hearing should not be held.

The Ninth Circuit law here sets an embarrassingly low standard (lawyers do not have to read the manual) and imposes a "Catch-22" burden on habeas petitioners: your lawyer did not attend to the obvious business of requiring proof of a major enhancement, but now that you have been made aware of the proof requirement, it is too late to hold any hearing on that requirement.

***The Tenth Circuit***

The Tenth Circuit holds just the opposite in *United States v. Glover, supra*, 97 F.3d 1345. In a reasoned approach, the Tenth Circuit concludes, based on the very

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[5] In coming to the extraordinary conclusion that the failure of an attorney to read the Sentencing Guidelines Manual is not substandard, the *McMullen* panel noted (98 F.3d at 1158) that the government had offered anecdotal evidence of 10 other cases where counsel failed to note the vast difference between "D" and "L" methamphetamine and used this as a basis for setting the terribly low standard of performance. Clearly, lawyers should be held to the responsibility of reading the manual, something really no more difficult than the reading of a manual to assist in assembling children's toys at the holiday season.

same circumstances as are involved in this case[6] and in the Ninth Circuit case of *McMullen,* that substandard performance and prejudice were demonstrated under the *Strickland* test.

As to whether the lapse of counsel is substandard, the Tenth Circuit observed that the "D" versus "L" distinction was "clearly meritorious under existing Guidelines and elementary burden-of-proof principles, surely both matters within the requisite expertise of a practicing member of the criminal defense bar." *Glover,* 97 F.3d at 1349. This surely is or ought to be the standard generally and even more so in relation to the all-controlling and easily-read Sentencing Guideline Manual. It simply disgraces standards generally to label as acceptable the performance of a lawyer who does not even read the manual. That other lawyers present, the prosecutors and the judge did not intervene or themselves raise and dispose of the sentencing distinction set forth in the Guidelines Manual, does not excuse the lawyer's performance, much less insulate it from the label "substandard". The other professionals present had their own responsibilities and were not "duty bound to pursue [the issue] with profession zeal." *Id.,* at 1350. Indeed, their failure to intervene assures the lapse, allows the imposition (without any attempt at a factual basis) of the much-higher sentence, thus generating the prejudice.

It is prejudicial to let stand a sentence based upon an assumption. *Glover,* 97 F.3d at 1350. This is particularly so where all that is required is a remand for hearing on the issue. *Glover* points out that, at such hearing, the district court can consider not only direct evidence of the presence of "D" methamphetamine in the drugs involved, but, if this is no longer available, the court can consider an array of circumstantial evidence on the matter. *Glover,*

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[6] In *Glover,* "the defense counsel did not invoke, the district court did not enforce, and the prosecution did not satisfy, the government's burden of proof regarding the type of methamphetamine upon which his sentence was based." *Id.,* 97 F.2d at 1348.

97 F.3d at 1350, note 5. In these circumstances, a holding that a criminal defendant is not prejudiced requires an Alice-in-Wonderland-like reasoning to this effect: "As a defendant, you can insist that the government prove the sentencing enhancement; but if your lawyer forgets this right or has not read the manual to learn of it, you lose that right and later you must prove the type of drug involved *even if* the government, which has been relieved of its burden, has now destroyed the only way in which you can prove the matter. Incidently, we also will not give you a hearing at which you can attempt such proof."

*Glover* should be the rule.

## II. GLOVER IS SOUND WHEREAS McMULLEN IS UNFAIR AND INVITES FUTURE MISTAKES

*Strickland* itself commands that the ultimate test for relief is not formalistic:

> In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of a particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

*Strickland,* 466 U.S. at 696, 104 S.Ct. 674 (1984). Surely, such breakdown has occurred when, as *Glover* aptly described it, "the defense counsel did not invoke, the district court did not enforce, and the prosecution did not satisfy, the government's burden of proof regarding the type of methamphetamine upon which his sentence was based." *Id.* 97 F.2d at 1348. The Second Circuit has, using the *Strickland* language quoted further above, ruled that counsel who falls asleep can not be said to have been effective. *Tippens v. Walker,* 77 F.3d 682 (2nd Cir. 1996). If *McMullen* rather than *Glover* is to be the nationwide standard, counsel, at least at sentencing hearings, may just as well go back to sleep. After all, a sentencing hearing *is* the Guidelines Manual and a debate over its many enhancements and reductions. That debate did not take place in this case.

If *McMullen* stands, it outlasts the "D" versus "L" controversy and affects determinations relating to virtually every other enhancement and reduction. Our national standards should be higher than *McMullen* would allow. The Tenth Circuit has not been shown to have suffered by insisting that counsel appearing in its courts read and understand the applicable Sentencing Manual provisions. Were *Glover* the national rule, not only would defense counsel more likely remain awake to the issue involved, the court and the prosecutor would step in if defense counsel did not, just as they frequently do in other phases of the criminal proceeding, in order to protect the record, while at the same time giving the defendant his due.

A remand for a hearing in this case on the "D"/"L" issue would promote such courtroom-wide vigilance, not to mention the insistence of fairness which undergirds *Strickland*. At such a hearing, the government should have the burden. Burdens should not shift because defense counsel fails in his job.

## CONCLUSION

The petition for a *writ of certiorari* should be granted.

Respectfully submitted,

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Dated: February 17, 1998

# APPENDIX

**APPENDIX**

[Filed Nov. 19, 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 96-35538
D.C. Nos. CV-95-06181-REJ
CR-90-60026-01-REJ

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.

JOSEPH JAY PICKREL,
*Defendant-Appellant.*

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No. 96-35738
D.C. Nos. CV-95-06182-REJ
CR-90-60026-2-REJ

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.

JAMES PICKREL,
*Defendant-Appellant.*

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MEMORANDUM *

Appeal from the United States District Court
for the District of Oregon
Robert C. Jones, District Judge, Presiding

Submitted November 17, 1997 **

Before: HUG, Chief Judge, PREGERSON and BEEZER, Circuit Judges.

In this consolidated appeal, federal prisoners Joseph Jay Pickrel and James Pickrel appeal the district court's denial of their 28 U.S.C. § 2255 motions to vacate sentences imposed after pleading guilty to conspiracy to manufacture and distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The Pickrels contend that their attorneys provided ineffective assistance during their sentencing proceedings. We review this claim de novo. *See United States v. McMullen*, 98 F.3d 1155, 1156-57 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2444 (1997). We have jurisdiction pursuant to 28 U.S.C. § 2255, and we affirm.

A successful ineffective assistance of counsel claim requires a defendant to show deficient performance by his attorney and prejudice from that deficiency. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland*'s deficiency prong requires the defendant to demonstrate that his counsel's performance fell below "the wide range of professionally competent assistance." *Id.* at 690. The prejudice prong requires the defendant to demonstrate

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, Appellants' request for oral argument is denied.

"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. An ineffective assistance claim may be rejected solely on the basis that the defendant did not demonstrate prejudice. *See id.* at 697.

The Pickrels contend that their attorneys were ineffective for failing to challenge the government's assumption that the Pickerels' offense involved d-methamphetamine rather than the less severely punished l-methamphetamine. This contention lacks merit because nothing in the record suggests that l-methamphetamine was actually involved in the case. *See McMullen*, 98 F.3d at 1158 (holding failure to raise Sentencing Guidelines distinction between d-methamphetamine and l-methamphetamine not ineffective assistance where attorney did not have notice that l-methamphetamine might be involved).

Next, the Pickrels argue that their attorneys were ineffective for failing to challenge the qualifications of the government's expert witness, a criminalist responsible for sampling and testing the methamphetamine. This argument lacks merit because the Pickrels have not demonstrated "a reasonable probability that," had their attorneys challenged the witness's expert credentials, "the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 694.

The Pickrels contend their attorneys were ineffective for failing to challenge the government's method of calculating the weight of the methamphetamine involved in their conspiracy. We disagree. The conspiracy was found to involve 108 kilograms of methamphetamine. Under the Sentencing Guidelines, the Pickrels' base offense level would have remained the same had their offense involved as little as twenty-five kilograms of methamphetamine. *See* U.S.S.G. § 2D1.1(a)(3) & comment. (n.10) (1987). The Pickrels have not demonstrated a reasonable probability that, had their attorneys challenged the government's weight calculations in the manner they now sug-

gest is proper, the amount of methamphetamine would have been decreased from 108 to less than twenty-five kilograms. *See Strickland*, 466 U.S. at 694.

Finally, the Pickrels' contention that the cumulative effect of their attorneys' errors amounts to ineffective assistance lacks merit because the Pickrels have failed to demonstrate prejudice. *See id.*

AFFIRMED.

# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

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No. CR 90-60026-1-JO

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

JOSEPH JAY PICKREL,
*Defendant.*

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JONES, Judge:

Joseph J. Pickrel, a federal prisoner, moves under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Pickrel asserts that: (1) the government failed to show by a preponderance of the evidence that the methampetamine seized from him was type "D" rather than type "L",[1] (2) the government miscalculated the weight of the methamphetamine, and (3) promises regarding a plea bargain were not met by the government. In addition, Pickrel claims that each of these alleged errors was the result of ineffective assistance by his counsel. He seeks a reduction in his term of imprisonment.[2] After reviewing the file and record in this case, I determine that the motion should be DENIED without further proceedings.

On October 29, 1990, Pickrel pled guilty to conspiracy to manufacture and possess with intent to distribute methamphetamine (21 U.S.C. § 841 (a)(1) and § 846). For

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[1] While 21 U.S.C. § 841 is applicable to both Dextro ("D") and Levo ("L") methamphetamine, sentencing provisions for the former are more severe.

[2] Pickrel asks that his offense level be reduced from 38 to 34, which would reduce his current 240 month sentence to a term of imprisonment ranging between 151 and 188 months.

these crimes, I sentenced him, on February 12, 1991, to 240 months imprisonment. Pickrel was represented by counsel, and he was given an opportunity to object to the presentence report before his sentencing.

## STANDARDS

28 U.S.C. § 2255 provides that the court shall grant the petitioner a hearing "unless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief." The court may deny a hearing if the petitioner's allegations, viewed against the record, fail to state a claim for relief. *United States v. Popoola*, 881 F.2d 811, 812 (9th Cir. 1989). Thus, to earn the right to a hearing the petitioner must allege specific facts which, if true, would entitle him to relief. *See Popoola*, 881 F.2d at 812.

Even where the government has the burden of proof, "the burden of alleging factual inaccuracies of the presentence report is on the defendant." *United States v. Deninno*, 29 F.3d 572, 580 (10th Cir. 1994). "Failure to object to a fact in a presentence report . . . acts as an admission of fact." *Id.* This bar applies equally to collateral attacks concerning the type of methamphetamine, *United States v. Ward*, 55 F.3d 412 (8th Cir. 1995), and the quantity of methamphetamine, *United States v. Seyfert*, 67 F.3d 544, 546 (5th Cir. 1995). Pickrel attempts to circumvent the procedural bar by asserting that he received ineffective assistance of counsel.

To succeed on a § 2255 motion based on allegations of ineffectiveness of counsel, a petitioner must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To show deficient performance, Pickrel must identify specific errors and omissions that fall outside "the wide range of reasonable professional assistance." *Id.* Moreover, prejudice requires more than a showing that the outcome would have been

different but for his counsel's error. Pickrel must also show that his counsel's performance rendered the result of the trial "unreliable" or the proceeding "fundamentally unfair." *United States v. Garcia*, 997 F.2d 1273, 1283 (9th Cir. 1993); *Lockard v. Fretwell*, 113 S.Ct. 838, 839 (1993).

## DISCUSSION

Pickrel's first claim is that his counsel was ineffective because he failed to object to the government's characterization of the methamphetamine as type "D". In support of this claim, he relies on *United States v. Dudden*, 65 F.3d 1461, 1471 (9th Cir. 1995),[3] and *United States v. Patrick*, 983 F.2d 206 (11th Cir. 1993), which held that the government must show by a preponderance of evidence that the methamphetamine is type "D". Neither *Dudden* nor *Patrick* involved a § 2255 motion, and in both cases the defendant preserved the issue for appeal. Because Pickrel did not preserve this issue for appeal, the success of his motion rests on his ability to show his counsel acted ineffectively.

The first prerequisite to a claim of ineffective counsel is deficient performance. *Strickland v. Washington, supra*, 466 U.S. at 689. The first reported case requiring the government to prove that methamphetamine was "D" as opposed to "L" was *United States v. Patrick, supra*, 983

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[3] In *Dudden*, a government informant was convicted of conspiracy to distribute methamphetamine. No methamphetamine or lab equipment was recovered, but the district court relied upon two affidavits, prepared for sentencing in a different case, which stated that methamphetamine labs usually produce type "D" rather than type "L" methamphetamine. Defense counsel preserved the issue for appeal by objecting. On appeal, the Ninth Circuit held that the government had the burden of proving that the methamphetamine was type "D" by a preponderance of the evidence, and that presentation of general affidavits was insufficient to meet this burden. *Dudden*, 65 F.3d at 1471.

F.2d at 206, decided well after Pickrel's conviction.[4] *Dudden, supra,* which Pickrel suggests should be the standard for his counsel's performance, was not decided until September 13, 1995. In effect, Pickrel is asking that the new standard for methamphetamine cases announced in *Patrick* and *Dudden* be retroactively applied years later to evaluate his counsel's effectiveness.[5] I decline to do this. The conduct of Pickrel's counsel was well within "the wide range of reasonable professional assistance."

Pickrel has also failed to satisfy his burden of showing of prejudice, the second prerequisite to a claim of ineffective counsel. Pickrel contends that his counsel's failure to challenge the government's classification of the methamphetamine as type "D" unfairly prejudiced him. However, expert testimony by the government at Pickrel's sentencing established that the primary type of methamphetamine produced by the "ephedrine/red phosphorous" method of manufacturing employed at his drug lab is type "D."

Pickrel also has offered no evidence to indicate that his lab probably did or even could have produced type "L" methamphetamine. This alone defeats his argument because he cannot meet the essential burden of demonstrating that the trial results were "unreliable" or "fundamentally unfair." *United States v. Garcia,* 997 F.2d at

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[4] Before *United States v. Patrick* was decided, the standard was substantially different. In *United States v. Koonce,* 884 F.2d 349, 353 (8th Cir. 1988), the court found that "the government adequately carried its burden of proof" without testing to determine the type of the methamphetamine.

[5] Even if Dudden were applied retroactively, it would not help Pickrel's position. In *Dudden* no methamphetamine was recovered, while in this case both chemicals and manufacturing equipment were recovered. The chemicals recovered and the manufacturing process discovered are only used to create type "D" methamphetamine. Pickrel has the independent burden of proving prejudice, *see Garcia, supra,* which he has failed to do. *See* discussion, *infra.*

1283. The mere supposition by Pickrel that methamphetamine could have been type "L" does not establish prejudice. Absent evidence to back up his claim, he has failed to show prejudice and is not entitled to relief.[6]

Pickrel's second claim is that his counsel was ineffective because he did not adequately challenge the government's methodology in calculating the quantity of methamphetamine seized from him. At the time of his conviction, the entire weight of a methamphetamine mixture was relevant for sentencing.[7] Whether the mixture was completely homogenous or pure is not relevant for purposes of evaluating the performance of Pickrel's counsel.[8] There also is no evidence of prejudice to Pickrel, because there is no indication from the record that additional questions regarding the calculation of the quantity of methamphetamine would have made a material difference in his sentence.

Finally, Pickrel claims that his counsel was ineffective because he did not object to the government's alleged failure meet the terms of his plea bargain agreement.

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[6] Even if this court were to ignore the evidence that the methamphetamine was type "D" and assume it was type "L", Pickrel would still have to establish a reasonable probability that had he known he would be sentenced for type "D" methamphetamine, he would have gone to trial rather than plead guilty.

[7] U.S.S.G. § 2D1.1 states: "Unless otherwise specified, the weight of a controlled substance set forth in the table [i.e. the table of Controlled Substances and Quantity] refers to the entire weight of any mixture or substance containing a detectable amount of controlled substance."

[8] Note: Amendment 484 changed this rule in 1993 as follows: "except as otherwise provided, a mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used." See U.S.S.G. App. C. p.482. Pickrel cannot use subsequent changes in the law in an attempt to prove that his counsel was ineffective at the time of sentencing.

There simply is no evidence to support this claim. Pickrel did have his sentenced capped at twenty years, and he was given credit for acceptance of responsibility. There is no evidence that the government made any misleading statements. The government stated that it would recommend a sentence that would be "at the low end of the sentence range," and it did. The fact that the court, in its discretion, imposed a greater sentence, does not constitute deception. Moreover, Pickrel makes no showing that he was prejudiced. He received the recommendation he bargained for.

## CONCLUSION

Pickrel has failed to demonstrate any specific errors or omissions that both fall outside professional competence and which prejudiced him by rendering the result of the trial unreliable or fundamentally unfair. For the reasons stated in this order, petitioner's § 2255 motion (#272-1) is DENIED. Any other pending motions are denied as moot, and this action is dismissed.

DATED this 17th day of April, 1996.

/s/ Robert E. Jones
ROBERT E. JONES
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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No. CR 90-60026-2-JO

UNITED STATES OF AMERICA,
*Plaintiff*,

v.

JAMES ROBERT PICKREL,
*Defendant*.

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ORDER

JONES, Judge:

James Robert Pickrel, a federal prisoner, moves under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. He asserts that: (1) the government failed to show by a preponderance of the evidence that the methamphetamine seized from him was type "D" rather than type "L",[1] (2) the government miscalculated the weight of the methamphetamine, and (3) promises regarding a plea bargain were not met by the government. In addition, he claims that each of these alleged errors was the result of ineffective assistance by his counsel. He seeks a reduction in his term of imprisonment. After reviewing the file and record in this case, I determine that the motion should be DENIED without further proceedings.

SUMMARY OF FACTS

On April 5, 1990, a grand jury returned an indictment charging James Robert Pickrel, his brother, Joseph Jay Pickrel, and others with violations of federal narcotics

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[1] While 21 U.S.C. § 841 is applicable to both Dextro ("D") and Levo ("L") methamphetamine, sentencing provisions for the former are more severe.

laws. On October 29, 1990, following extensive negotiations, James Robert Pickrel pled guilty in conspiracy to manufacture and possess with intent to distribute methamphetamine (21 U.S.C. § 841(a)(1) and § 846). He was represented by counsel and given an opportunity to object to the presentence report. For these crimes, I sentenced him, on February 12, 1991, to 160 months imprisonment.

DISCUSSION

James Robert Pickrel's arguments for relief under 28 U.S.C. § 2255 are identical to those of his brother, Joseph Jay Pickrel. For the same reasons discussed in *U.S. v. Joseph Jay Pickrel*, No. CR 90-60026-1-JO (Order, April 17, 1996), his motion is DENIED without further proceedings.

DATED this 28th day of May, 1996.

/s/ Robert E. Jones
ROBERT E. JONES
United States District Judge

**Excerpts**
**United States Sentencing Guidelines**

2D1.1. *Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)*

(a) Base Offense Level:

(1) 43, for an offense that results in death or serious bodily injury with a prior conviction for a similar drug offense; or

(2) 38, for an offense that results in death or serious bodily injury and involved controlled substances (except Schedule III, IV, and V controlled substances and less than: (A) fifty kilograms of marihuana, (B) ten kilograms of hashish, and (C) one kilogram of hashish oil); or

(3) For any other offense, the base offense level is the level specified in the Drug Quantity Table below.

* * * *

DRUG QUANTITY TABLE

| *Controlled Substances and Quantity** | *Base Offense Level* |
|---|---|
| 10 KG Heroin or equivalent Schedule I or II Opiates, 50 KG Cocaine or equivalent Schedule I or II Stimulants, 500 G Cocaine Base, 10 KG PCP or 1 KG Pure PCP, 100 G LSD or equivalent Schedule I or II Hallucinogens, 4 KG Fentanyl or 1 KG Fentanyl Analogue, 10,000 KG Marihuana, 100,000 Marihuana Plants, 2000 KG Hashish, 200 KG Hashish Oil (or more of any of the above) | Level 36 |

| *Controlled Substances and Quantity** | *Base Offense Level* |
|---|---|
| 3-9.9 KG Heroin or equivalent Schedule I or II Opiates, 15-49.9 KG Cocaine or equivalent Schedule I or II Stimulants, 150-499 G Cocaine Base, 3-9.9 KG PCP or 300-999 G Pure PCP, 30-99 G LSD or equivalent Schedule I or II Hallucinogens, 1.2-3.9 KG Fentanyl or 300-999 G Fentanyl Analogue, 3000-9999 KG Marihuana, 30,000-99,999 Marihuana Plants, 600-1999 KG Hashish, 60-199 KG Hashish Oil | Level 34 |

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*DRUG EQUIVALENCY TABLES*

*Cocaine and Other Schedule I and II Stimulants*

* * * *

1 gm of Methamphetamine =
2.0 gm of cocaine/0.4 gm of heroin

1 gm of L-Methamphetamine/Levo-methamphetamine/ L-Desoxyephedri=
0.2 gm of cocaine/0.04 gm of heroin

**Excerpts from**
**District Court Hearing Transcripts**

The prosecutor called them "horrific." Transcript of Hearing, October 25, 1990, p. 3 (Appendix, No. 3). The Court indicated the severity of these sentences at various times during the sentencing hearing, stating at one point: "I just snatched away the flower of your life, 20 years." Transcript of Hearing, February 12, 1991, at p. 175 (Appendix, No. 6). The Court correctly summarized the tragic proportions of the sentences involved by saying the following:

> It's a fairly—you know, it's a very difficult thing for the Court to impose this amount of time on anybody. The fact of the matter is, you'll be doing more time than the average person who commits murder in this state, which is incredible.

Transcript of Hearing, February 12, 1991, at p. 173 (Appendix, No. 6).